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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. [redacted] 229

In the Matter of
JEFFREY FISCHER,
a minor.

APPEAL FROM THE COURT OF APPEALS,
EIGHTH JUDICIAL DISTRICT OF OHIO.

APPELLANT'S REPLY BRIEF TO APPELLEE'S ALTERNATIVE MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT OF LOWER COURT.

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1461.

In the Matter of
JEFFREY FISCHER,
a minor.

APPEAL FROM THE COURT OF APPEALS,
EIGHTH JUDICIAL DISTRICT OF OHIO.

APPELLANT'S REPLY BRIEF TO APPELLEE'S ALTERNATIVE MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT OF LOWER COURT.

The State in its Motion to Dismiss has raised a welter of arguments, none of which affect the essential issues of this case. The State's smokescreen can be reduced to three simple contentions:

1) that Jeffrey Fischer had Counsel *at his trial,* and that because of this alone, this trial as a civil proceeding met all the constitutional requirements of due process and fair trial,

2) that Jeffrey Fischer was treated gently and kindly at the police station,

3) that the confession of Jeffrey Fischer, to the extent that it accorded with the testimony of other witnesses, must have been true and reliable and therefore was rightly admitted at trial in spite of his repudiation thereof.

To this the State adds many wild and irrelevant arguments, many of which do not even merit a response herein. They are largely devoted to showing the guilt of appellant and the truth of his confession (but see *Rogers v. Richmond*, 365 U. S. 534, 81 S. Ct. 735, 5 L. Ed. 2d 760 [1961]) apparently on the theory that constitutional deficiencies may be ignored if the State argues loudly enough the guilt of the Defendant and unusual gentleness and consideration with which he was supposedly treated.

Most remarkably, the State appears to have chosen this Court as yet another forum in which to argue that appellant set the fires in question, and that he was given more consideration than so obviously "guilty" a youth deserves. *These issues have no place in this appeal.*

What are the real issues in this case upon which jurisdiction is sought? All the State's persiflage cannot deny or obscure the fact that at no time when Jeffrey Fischer was *in the police station* allegedly confessing, were either he or his parents:

1) Represented by counsel,

2) Advised of the right to have counsel,

3) Advised of the right to remain silent,

4) Advised of the right against self-incrimination.

These deficiencies raise fundamental constitutional questions which this Court has taken pains to answer—for adults in criminal proceedings—in *Escobedo v. State of Illinois*, 378 U. S. 478, 84 S. Ct. 1758, *Miranda v. State of Arizona*, 384 U. S. 436, 86 S. Ct. 1602, and a host of other decisions. Nor can the State argue that such questions are any the less fundamental merely because a *juvenile* seeks the constitutional guarantees of due process. Whether or not appellant's mother complimented and

thanked the police—or any other similarly trivial matter raised by the State—simply has no bearing on the major constitutional deficiencies of police station procedure presented in the case at bar.

Application of Gault, 87 S. Ct. 1428, left unresolved "constitutional rights applicable to the pre-judicial stages of the juvenile process." Precisely such questions are raised by this appeal, which for juvenile proceedings stands in much the same relation to the *Gault* decision as the *Escobedo* and *Miranda* decisions stand to *Gideon v. Wainwright,* 372 U. S. 335, 83 S. Ct. 792 and other decisions protecting the rights of the accused at trial itself.

The spirit of the *Gault* decision, as exemplified in Section V, "Confrontation, Self-Incrimination, Cross-Examination," should be extended to encompass the constitutional rights of the juvenile under police-station interrogation. This Court in that decision turned its attention to the admission of improperly obtained confessions in juvenile court hearings.

> "Specifically, the question is whether, in such a proceeding, an admission by the juvenile may be used against him in the absence of clear and unequivocal evidence that the admission was made with knowledge that he was not obliged to speak and would not be penalized for remaining silent. In light of *Miranda v. State of Arizona,* 384 U. S. 346, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), we must also consider whether, if the privilege against self-incrimination is available, it can effectively be waived unless counsel is present or the right to counsel has been waived." *Gault, supra,* at 1452.

This Court spoke with approval of *In Matters of W. and S.,* 19 N. Y. 2d 55, 277 N. Y. S. 2d 675, 224 N. E. 2d 102 (1966) and *In Interests of Carlo and Stasilowicz,* 48 N. J. 224, 225 A. 2d 110 (1966), two decisions in which a

delinquency determination was set aside because a confession was found inadmissible.

This Court then answered the frivolous contention of the State in the case at bar that weight must be given the "civil" label attached to Ohio Juvenile Court proceedings.

> "It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment, applicable to the State by operation of the Fourteenth Amendment, is unequivocal and without exception. And the scope of the privilege is comprehensive. As Mr. Justice White, concurring, stated in *Murphy v. Waterfront Commission*, 378 U. S. 52, at 94, 84 S. Ct. 1594, at 1611, 12 L. Ed. 2d 678 (1964):
>
> 'The privilege can be claimed in *any proceeding*, be it criminal or civil, administrative or judicial, investigatory or adjudicatory, * * * it protects *any disclosures* which the witness may reasonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used.*'" (Emphasis supplied.) 79. *Gault, supra,* at 1454.
>
> "* * * In the first place, juvenile proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings." *Gault, supra,* at 1455.

The State in its Motion to Dismiss (page 8) admits:

> "Moreover, in this case the Fischers were most fortunate indeed that Juvenile Judge Whitlach did not refer this case to the grand jury and Common Pleas

> Court as a felony, which he had a legal right to do under Ohio Revised Code, Sec. 2151.26."

The fact that a criminal prosecution could be instituted was precisely the second reason enumerated in the *Gault* opinion (page 1456) why safeguards must be granted to the juvenile defendant whose confession is sought.

This Court concluded by emphasizing the importance of the presence of Counsel and of taking "the greatest care" to insure the voluntariness of an admission (*Gault, supra,* page 1458), and it drew no distinction that would make these requirements any the less essential for the juvenile in the police station than for the juvenile in court. If anything, the *Gault* opinion adumbrates that the juvenile suspect, as much as and even more than the adult, needs the safeguards of the Fifth, Sixth, and Fourteenth Amendments more urgently in the stationhouse than at trial.

The "confession" of Jeffrey Fischer was first obtained by Officer Carr, out of the presence of Gerald's parents, without counsel and without advising him of his right to silence. It was the "confession" of a psychologically disturbed seventeen-year-old, subjected to lie-detector tests, shut up in an interrogation room apart from his parent, and never informed of his right to have counsel or his privilege against self-incrimination.

This confession should have been excluded because it was taken in a manner that failed to satisfy the elementary dictates of due process enunciated by this Court, not only the requirements of *Miranda* and *Escobedo,* but also basic concepts of voluntariness alone. Due process is not satisfied by a juvenile court hearing at which such a confession is admitted and forms the major basis for the adjudication of delinquency. The *Gault* decision explicitly recognizes this.

CONCLUSION.

Jeffrey Fischer, defendant-appellant herein, was not represented by Counsel or informed of his right to Counsel and right to remain silent at the time of his police-station confession. The arguments of the State cannot becloud this simple fact. It is respectfully submitted that, in accord with the principles laid down in the *Gault* decision, this Court should grant a summary ruling by which jurisdiction is exercised and the case reversed, or at the very least remanded for further proceedings not inconsistent with the *Gault* decision.

Respectfully submitted,

DAVID I. SINDELL,
Counsel for Appellant.